well. *Id.* at 4a; see 33 U.S.C. 1344(j); 40 C.F.R. 233.50(j).

In August 1999, petitioners applied to the Corps for a permit to fill the wetland. Pet. App. 4a; C.A. App. 32-40. The application indicated that petitioners would fill 15.87 acres of wetland while dredging and replanting 3.74 acres. Pet. App. 4a. Various parties objected to the permit application, including EPA, FWS, the Lake St. Clair Advisory Committee, and the Water Quality Unit of the Macomb County Prosecutor's Office. C.A. App. 79-90.

In September 2000, after three site inspections, the Corps issued its permit evaluation. Pet. App. 4a. The Corps concluded that petitioners' proposed development activities would have substantial negative impacts on water quality, terrestrial wildlife, and the overall ecology, plus lesser effects regarding downstream erosion and sedimentation, flood hazards and floodplain values, and aquatic wildlife. *Ibid.*

In October 2000, the Corps officially notified petitioners that it had denied their permit application. Pet. App. 4a-5a. The Corps found that petitioners' proposed filling activities were subject to the CWA because, *inter alia*, the relevant wetland is "adjacent to a drain which empties directly into a [covered] water." *Id.* at 69a.[2]

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[2] The Corps' initial denial of petitioners' permit application was issued before this Court's decision in *SWANCC*. In finding that petitioners' proposed discharge was subject to the CWA, the Corps relied in part on record evidence "establish[ing] the site as being used for interstate commerce (neo-tropical migratory bird stopping point)." Pet. App. 69a. In its subsequent decision denying petitioners' administrative appeal, the Corps recognized that this Court's intervening decision in *SWANCC* "negated use of the Migratory Bird Rule to establish an interstate commerce connection on isolated, intrastate waters." *Id.* at 63a. The Corps concluded, however, that "[t]he

Given the anticipated negative effects of the proposed discharges on "water quality, flood hazards, aquatic and terrestrial biota, recreation, and conservation and overall ecology," the Corps concluded that "the detriments greatly outweigh the benefits to the overall public interest." *Id.* at 70a-71a; see *id.* at 5a.

In December 2000, petitioners filed an administrative appeal, arguing, *inter alia*, that the Corps lacks regulatory jurisdiction over the wetland. Pet. App. 5a. In March 2001, the Corps denied the administrative appeal. *Id.* at 58a-68a. The Corps found that petitioners' proposed filling activities were subject to the CWA because the wetland on their property is "adjacent to a surface tributary system of a navigable waterway, Lake St. Clair." *Id.* at 61a; see *id.* at 60a-64a. The Corps explained that "the man-made spoil berm that separates the wetland from the ditch does not exclude adjacency [under 33 C.F.R. 328.3(c)]." *Id.* at 62a.

5. In July 2001, petitioners filed suit in the United States District Court for the Eastern District of Michigan, challenging the Corps' denial of their permit application. Pet. App. 6a; C.A. App. 6. Petitioners alleged, *inter alia*, that the Corps and EPA lacked regulatory jurisdiction over their proposed filling activities because the wetland on their property was not part of the "waters of the United States" within the meaning of the CWA. *Id.* at 15-16. The case was referred to a magistrate judge, and the parties submitted cross-motions for summary judgment. Pet. App. 6a.

The magistrate judge issued a report and recommendation that the district court grant summary judgment

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SWANCC decision is not relevant to [petitioners'] proposal because the subject wetlands are not isolated." *Ibid.*

to the Corps and EPA. Pet. App. 20a-57a. The magistrate judge concluded that, "because [petitioners'] property is adjacent to neighboring tributaries of navigable waters and has a significant nexus to 'waters of the United States,' it is in fact not isolated, and is subject to the jurisdiction of the CWA." *Id.* at 49a. The district court adopted the magistrate judge's report and recommendation and entered judgment in favor of the Corps and EPA. *Id.* at 15a-17a.

6. The court of appeals affirmed. Pet. App. 1a-13a. The court held that, under the CWA and implementing regulations, the Corps has regulatory jurisdiction over petitioners' proposed discharges because the wetland on their parcel is adjacent to tributaries of a traditional navigable water. *Id.* at 9a-10a. In particular, the court recognized that a wetland separated only by a berm or other man-made barrier from a tributary remains "adjacent" to that tributary under 33 C.F.R. 328.3(a)(7). Pet. App. 9a-10a. The court of appeals also concluded that this Court's decision in *SWANCC* did not cast doubt on the validity of the Corps and EPA regulations governing "adjacent wetlands," which this Court had upheld in *Riverside Bayview*. *Id.* at 10a-12a. The court of appeals upheld the district court's determination that "there is a 'significant nexus' between the wetland on the [petitioners'] property and the adjacent nonnavigable ditch abutting their property, a ditch that flows one way or another into other tributaries of navigable waters of the United States." *Id.* at 12a.

ARGUMENT

The decision of the court of appeals is correct and does not squarely conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 4, 6, 8-23) that the assertion of federal regulatory authority in this case was impermissible under the Clean Water Act and conflicts with decisions of this Court and other courts of appeals because the wetland at issue here lacks any hydrologic connection with a traditional navigable water. That contention rests on a mistaken understanding of the factual record, and it does not merit review.

Petitioners repeatedly assert (Pet. 4, 6, 8, 19, 21) that the wetland at issue in this case is not hydrologically connected to other waters. The record does not support that characterization of the relevant wetland. Rather, the wetland on petitioners' tract has at least an occasional hydrologic connection to the unnamed ditch and thus to Lake St. Clair, a traditional navigable water.

The Corps, whose factual findings are entitled to substantial deference, see 5 U.S.C. 706(2)(E), concluded that the small berm lying between the wetland and the adjacent ditch "serves to block *immediate* drainage out of the parcel and hold[s] water *until it is quite high*." C.A. App. 108 (emphasis added). The court of appeals likewise stated that the berm "serves to block *immediate* drainage of surface water out of the parcel into the ditch." Pet. App. 3a (emphasis added). Neither the Corps nor the courts below described the berm as blocking *all* water movement from the wetland to the ditch. Petitioners' expert and attorney conceded in the administrative record that water would sometimes move from

the wetland to the ditch and that "drainage cuts that run through that berm" would facilitate such flow. C.A. App. 639. The question whether the CWA encompasses wetlands that lack any hydrologic connection to other covered waters therefore is not properly presented in this case.

2. Petitioners contend (Pet. 14-15) that review by this Court is warranted to resolve the question whether the CWA covers wetlands that are adjacent to non-navigable tributaries of traditional navigable waters, or only wetlands that are adjacent to the traditional navigable waters themselves. Petitioners did not argue in the court of appeals that wetlands adjacent to non-navigable tributaries are excluded from the CWA's coverage. And while the court of appeals referred briefly (see Pet. App. 10a) to its prior rejection of a similar argument in *United States* v. *Rapanos*, 339 F.3d 447 (6th Cir. 2003), cert. denied, 541 U.S. 972 (2004) (*Rapanos I*), the court did not otherwise address the question. This Court should therefore decline to address petitioners' claim. See, *e.g.*, *Kosak* v. *United States*, 465 U.S. 848, 850 n.3 (1984); *United States* v. *Lorasco*, 431 U.S. 783, 788 n.7 (1977). In any event, that claim lacks merit.[3]

a. Petitioners refer in passing (Pet. 15) to this Court's statement in *SWANCC* that CWA coverage does not "extend[ ] to ponds that are *not* adjacent to open water." *SWANCC*, 531 U.S. at 168. The Court was allud-

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[3] During the 2003 Term, this Court denied three petitions for writs of certiorari that raised substantially similar claims. See *Newdunn Assocs., LLP* v. *United States Army Corps of Eng'rs*, 541 U.S. 972 (2004) (No. 03-637); *Deaton* v. *United States*, 541 U.S. 972 (2004) (No. 03-701); *Rapanos* v. *United States*, 541 U.S. 972 (2004) (No. 03-929). There is no reason for a different result in this case.

ing to a footnote in *Riverside Bayview* in which the Court had reserved the "question of the authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water, see 33 C.F.R. §§ 323.2(a)(2) and (3) (1985)." 474 U.S. at 131-132 n.8 (quoted in *SWANCC*, 531 U.S. at 167-168). When that footnote is read in context, it is clear that the Court in *Riverside Bayview* was reserving the question of jurisdiction over wetlands that are isolated from, rather than adjacent to, any other regulated waters, without regard to those waters' navigability.[4]

Elsewhere in the *Riverside Bayview* opinion, moreover, the Court used the phrase "open water" as a shorthand for "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters,'" in order to distinguish those types of water bodies from wetland areas, such as "shallows, marshes, mudflats, swamps [and] bogs." 474 U.S. at 131-132. The Court did not use the phrase "open water" to distinguish navigable from nonnavigable streams. See, *e.g.*, *id.* at 134 (using the phrase "adjacent bodies of open water" interchangeably with "adjacent lakes, rivers, and streams," without reference to navigability). Finally, under a contrary interpretation of the term "open water," the CWA would not encompass wetlands adjacent to nonnavigable tribu-

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[4] The pertinent footnote in *Riverside Bayview* cited 33 C.F.R. 323.2(a)(2) and (3) (1985), which have since been re-codified at 33 C.F.R. 328.3(a)(2) and (3). Those are the subsections of the regulatory definition of "waters of the United States" that cover interstate and isolated intrastate wetlands, respectively. If, by referring to "wetlands that are not adjacent to bodies of open water," the Court had meant to include wetlands adjacent to nonnavigable tributaries, it would presumably have cited as well 33 C.F.R. 323.2(a)(5) and (7) (1985), which encompass nonnavigable tributaries and wetlands adjacent to those tributaries.

taries that are themselves part of "the waters of the United States." That view cannot be reconciled with *Riverside Bayview*, which held that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id.* at 135.

b. Petitioners fail to identify a square conflict among the courts of appeals on the question whether wetlands adjacent to nonnavigable tributaries of traditional navigable waters fall within the CWA's coverage. Petitioners' reliance (Pet. 14-15, 20-21) on *Rice* v. *Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), is misplaced. *Rice* addressed the question whether the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, imposed liability on parties who discharged oil onto dry ground, when that oil was alleged to have migrated into various types of waters. See *Rice*, 250 F.3d at 265-266. Like the CWA, the OPA regulates discharges into "navigable waters," defined as "the waters of the United States." 33 U.S.C. 2701(21); see 33 U.S.C. 2702(a). The term is generally understood to have the same meaning under both statutes. See *Rice*, 250 F.3d at 267-268.

The court in *Rice* rejected each of three suggested bases for the imposition of OPA liability. First, the Fifth Circuit addressed the question whether the OPA regulated "discharges of oil that contaminate the groundwater," and it held that "subsurface waters are not 'waters of the United States' under the OPA." 250 F.3d at 270. Second, the court in *Rice* addressed the plaintiffs' contention that "surface waters on the [property] are directly threatened by [the defendant's] discharges into the groundwater." *Ibid.* The court found that all discharges were onto dry land and that there

was no evidence of any discharge directly into surface water. *Ibid.* The court further concluded that, even if the discharges could be shown to have seeped into the surface waters on the ranch, the record was insufficient to support a determination that those waters were part of "the waters of the United States." The court explained that the record in the case contained "no detailed information about how often the creek runs, about how much water flows through it when it runs, *or about whether the creek ever flows directly (above ground) into the Canadian River.*" *Id.* at 270-271 (emphasis added). Absent proof of a surface connection between the creek in question and any traditional navigable water, the court was unable to conclude that the creek was "sufficiently linked to an open body of navigable water as to qualify for protection under the OPA." *Id.* at 271. Third, the court in *Rice* addressed the question whether "discharges into groundwater that migrate into protected surface waters" are covered by the OPA. *Ibid.* The court held that the OPA does not apply to "discharges onto land, with seepage into groundwater, that have only an indirect, remote, and attenuated connection with an identifiable body of 'navigable waters.'" *Id.* at 272.

Thus, the Fifth Circuit's decision in *Rice* was premised on the absence of any demonstrated surface water connection between the allegedly contaminated seasonal creek and any traditional navigable water. Because the case did not involve a discharge into wetlands, the Fifth Circuit had no occasion to define the circumstances in which wetland areas can properly be treated as part of the "waters of the United States." In particular, the court in *Rice* did not discuss either (i) whether the CWA encompasses wetlands adjacent to a nonnavigable tribu-

tary of a traditional navigable water, or (ii) whether the presence of a berm or similar barrier precludes treatment of a wetland as "adjacent" to a neighboring water body. The decision in *Rice* therefore is not inconsistent with the Sixth Circuit's ruling here.

For similar reasons, the Fifth Circuit's decision in *In re Needham*, 354 F.3d 340 (2003), see Pet. 14-15, 20-21, does not squarely conflict with the Sixth Circuit's decision in this case. *Needham*, like *Rice*, involved a suit under the OPA. 354 F.3d at 342. The oil at issue in *Needham* "was originally discharged into [a] drainage ditch at Thibodeaux Well," and from there "spilled into Bayou Cutoff, and then into Bayou Folse. Bayou Folse flows directly into the Company Canal, an industrial waterway that eventually flows into the Gulf of Mexico." *Id.* at 343. The Fifth Circuit held that the defendants' conduct was covered by the OPA. *Id.* at 346-347. The court stated that "the proper inquiry is whether Bayou Folse, the site of the farthest traverse of the spill, is navigable-in-fact or adjacent to an open body of navigable water." *Id.* at 346. The Fifth Circuit found that "Bayou Folse is adjacent to an open body of navigable water, namely the Company Canal," *ibid.*; and it concluded on that basis that "the Thibodeaux Well oil spill implicated navigable waters and triggered federal regulatory jurisdiction pursuant to the OPA," *id.* at 347.

In the course of its analysis, the Fifth Circuit appeared to disapprove the results reached by the Sixth and Fourth Circuits in *Rapanos I* and *United States* v. *Deaton*, 332 F.3d 698 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004), and it stated that "[t]he CWA and the OPA are not so broad as to permit the federal government to impose regulations over 'tributaries' that are neither themselves navigable nor truly adjacent to navi-

gable waters." 354 F.3d at 345. That statement was dictum, however, in light of the *Needham* court's determination that the oil spill actually involved in that case was covered by the OPA. And while the *Needham* court stated that "both the regulatory and plain meaning of 'adjacent' mandate a significant measure of proximity," *id.* at 347 n.12, and that "the term 'adjacent' cannot include every possible source of water that eventually flows into a navigable-in-fact waterway," *id.* at 347, the court did not offer a precise rule for determining when a nonnavigable tributary is "adjacent" to a traditional navigable water.[5] Nor did the court in *Needham* consider the application of the CWA to wetlands of any sort. Thus, even assuming that the Fifth Circuit follows the *Needham* dictum in a future case in which the issue is actually presented, it is unclear to what extent the approaches taken by the Sixth and Fifth Circuits would lead to different results in concrete factual settings.

3. Petitioners contend (Pet. 5, 24-28) that Congress lacks authority under the Commerce Clause to regulate discharges of pollutants into the wetland at issue in this case. Petitioners did not raise that claim in the court of appeals, nor did the court address any constitutional question. Petitioners' Commerce Clause challenge therefore is not properly preserved for review by this Court. See *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

In any event, every court of appeals that has addressed the question has held that the CWA may constitutionally be applied to nonnavigable tributaries and

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[5] Under the regulations, "adjacency" is relevant only to wetlands, not to tributaries. 33 C.F.R. 328.3(a)(5) and (7); 40 C.F.R. 230.3(s)(5) and (7).

their adjacent wetlands.[6] This Court and others have long recognized Congress's power to regulate pollutant discharges into waters that are not themselves navigable where such regulation is reasonably necessary to maintaining the quality of traditional navigable waters. Petitioners' constitutional claim lacks merit and does not warrant this Court's review.

a. Because the Corps' exercise of regulatory authority over adjacent wetlands and discharges serves the federal goals of protecting navigability and enhancing water quality in traditional navigable waters, this case implicates core federal interests that were not present in *SWANCC*. Congress's "power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce," *Deaton*, 332 F.3d at 706—the first of the three categories of permissible Commerce Clause legislation identified by this Court in *United States* v. *Lopez*, 514 U.S. 549, 558 (1995)—and that power "carries with it the authority to regulate non-navigable waters when that regulation is necessary to achieve Congressional goals in protecting navigable waters," *Deaton*, 332 F.3d at 707.

Riverside Bayview squarely held that the Corps and EPA may assert regulatory authority over at least *some* wetlands and other waters that do not themselves meet traditional tests of navigability, based on their connec-

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[6] See, *e.g.*, *United States* v. *Pozsgai*, 999 F.2d 719, 733-734 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994); *United States* v. *Hartsell*, 127 F.3d 343, 348-349 (4th Cir. 1997); *United States* v. *Tull*, 769 F.2d 182, 185 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); *United States* v. *Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1325-1329 (6th Cir. 1974); *United States* v. *Byrd*, 609 F.2d 1204, 1209-1210 (7th Cir. 1979). See also *Hodel* v. *Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 282 n.21 (1981) (citing favorably to *Ashland Oil* and *Byrd*).

tions to traditional navigable waters. See 474 U.S. at 133.[7] And while *Riverside Bayview* did not involve a Commerce Clause challenge to the Corps' regulations, petitioners do not question Congress's constitutional authority to regulate pollutant discharges into wetlands that have hydrologic connections to traditional navigable waters and their tributaries. Instead, petitioners' constitutional argument is based on the contention that the wetland at issue here lacks a hydrologic connection to any other water. See Pet. 24-28. As explained above, however (see pp. 9-10, *supra*), petitioners' characterization of the facts is unfounded. Accordingly, review is not warranted.

b. Petitioners' reliance (Pet. 25-26) on this Court's decision in *Lopez* is misplaced. *Lopez* considered the validity of a federal statute under the third of three categories of permissible Commerce Clause legislation identified by the Court, *i.e.*, the regulation of activities that "substantially affect" interstate commerce. 514 U.S. at 558-559. Contrary to petitioners' contention (Pet. 26), the present case involves legislation falling within the first category of permissible Commerce Clause legislation identified by the Court, *i.e.*, regulation of the use of the channels of interstate commerce. *Id.* at 558. As the court in *Deaton* correctly concluded, Congress's "power over navigable waters is an aspect of the authority to regulate the channels of interstate commerce," 332 F.3d at 706, and that power "carries with it the authority to regulate nonnavigable waters when that regulation is necessary to achieve Congressional goals

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[7] The courts have long recognized that pollution and environmental degradation in the nonnavigable portion of a tributary system may have an adverse effect on water quality in the traditional navigable waters to which those tributaries lead. See, *e.g.*, *Ashland Oil*, 504 F.2d at 1326.

in protecting navigable waters," *id.* at 707. *Lopez* does not undermine that conclusion.

Moreover, even with respect to legislation falling within the third *Lopez* category, a reviewing court need only find that a "rational basis exist[s] for concluding" that a regulated activity substantially affects interstate commerce. 514 U.S. at 557. Here, there is considerably more than a "rational basis" for concluding that discharges of pollutants into wetlands that are adjacent to nonnavigable tributaries of traditional navigable waters have a substantial effect, in the aggregate, on the downstream navigable waters. See *id.* at 558. As a general matter, the harm caused by discharges of dredged or fill material into wetlands includes, but is not limited to, the release of sediment downstream. An even greater harm arises from the *filling* of wetlands, which, as a general matter, reduces or destroys their capacity to perform a variety of essential hydrological and ecological functions, such as filtering and absorbing pollutants from runoff and storing flood waters. See *Riverside Bayview*, 474 U.S. at 134-135. And the Corps found that petitioners' filling of the wetland at issue here would result in just such harm. Pet. App. 70a-71a; see *id.* at 5a.

c. Petitioners contend that, if the CWA is construed to cover the wetland at issue in this case, the Act would "intrude upon the states' primary power to regulate land and water use." Pet. 27. That contention lacks merit. Even with respect to those waters that are encompassed by the regulatory definition of "waters of the United States," the only activity that requires a CWA permit is the discharge of a pollutant (including dredged spoil, sand, and rock) from a point source. Other functions and activities relating to land use remain in the hands of local authorities.

In any event, the federal government possesses long-standing and well-established power to protect the quality of traditional navigable waters by regulating upstream pollutant discharges. See p.16, *supra*. As cases like *Riverside Bayview* make clear, the exercise of that authority may as a practical matter affect activities (*e.g.*, residential housing development, see *Riverside Bayview*, 474 U.S. at 124) that are also subject to extensive state regulation. See *Deaton*, 332 F.3d at 707 ("The power to protect navigable waters is part of the commerce power given to Congress by the Constitution, and this power exists alongside the states' traditional police powers."). So long as the assertion of federal regulatory authority in this case was an otherwise permissible use of the power to protect traditional navigable waters, the requirement that petitioners seek a CWA permit for their fill activities does not impermissibly encroach on state and local land-use planning. See *id.* at 707-708.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 04-1384

IN THE

Supreme Court of the United States

JUNE CARABELL; KEITH CARABELL;
HARVEY GORDENKER; FRANCES GORDENKER,
PETITIONERS

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
UNITED STATES ENVIRONMENTAL AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF

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I

PETITIONERS' PROPERTY LACKS A HYDROLOGICAL CONNECTION WITH ANY FEDERAL WATERS AND THEREFORE IS NOT SUBJECT TO REGULATION UNDER THE CLEAN WATER ACT

The most notable aspect of Respondents' brief in opposition is that it does not even attempt to refute Petitioners' primary legal argument: that a wetland, such as the one on Petitioners' property, cannot be subject to regulation under § 404 of the Clean Water Act, 33 U.S.C. § 1344, ("CWA" or "the Act), when it lacks a hydrological connection with federal waters. Instead, Respondents attempt to avoid directly addressing this argument by asserting that the wetland on Petitioners' property has a hydrological connection to federal waters. Because Respondents' factual assertions are contrary to the record evidence and because Respondents do not address the legal error reflected in the court of appeals' decision, Respondents have not shown why this Court should not take jurisdiction of this case.

Respondents state that "the wetland on petitioners' tract has at least an occasional hydrologic connection to . . . Lake St. Clair, a traditional navigable water" because the United States Army Corps of Engineers ("the Corps") found – and the lower courts agreed – that a berm prevents the "immediate drainage" of the wetland to an adjacent tributary of Lake St. Clair. (*See* Brief in Opposition at 9). This statement does not accurately describe the evidence in the administrative record or the findings by either the Corps or the lower courts.

In fact, as Petitioners have noted, the Corps actually made a contrary finding during the administrative proceedings in this case. In its permit evaluation, which is part of the administrative record, the Corps discussed whether the wetland on Petitioners' property was connected to the Sutherland-Oemig Drain, which is the nearest tributary of Lake St. Clair, and the Corps found that "the parcel is not currently part of the S-O Drain watershed." (Petition at 52a) (quoted in the opinion of the district court). The Random House Dictionary of the English language defines "watershed" as, among other things, "the region or area drained by a river, stream, etc." Similarly, a website of Respondent United States Environmental Protection Agency ("EPA") defines "watershed" as "the area of land where all of the water that is under it or drains off of it goes into the same place." *See* http://www.epa.gov/owow/watershed/whatis.html. Given these definitions, the Corps' finding that the wetland was not part of the watershed for the Sutherland-Oemig Drain is, in essence, a finding that there is no ground or surface water connection between Petitioners' wetland and the Sutherland-Oemig Drain. And if there is no hydrological connection between the wetland and the Sutherland-Oemig Drain, there is no hydrological connection between the wetland and any federal water. The undisputed facts in the record show that the Sutherland-Oemig Drain is the only conduit for water from Petitioners' property to anything that comes within the jurisdiction of the CWA. Consequently, during the administrative phase of this case, the Corps essentially found that Petitioners' property is hydrologically isolated from any federal

water, and the district court's opinion adopted that finding.[1]

Respondents first attempted to obscure the Corps' unequivocal finding in their brief to the Sixth Circuit, where they contended, as they do in this Court, that it was possible for water to accumulate in the wetland so that it overtopped the berm separating the wetland from the Sutherland-Oemig Drain. (Respondents' Court of Appeals Brief at 8). The problem with this argument is that it is not based upon any finding actually made by the Corps or the district court; it is a theoretical postulation, which is not directly supported by any evidence. There is nothing in the record to show any finding or even any suggestion by a factfinder that water had ever overtopped the berm at any time. Respondents' contention about the prospects for drainage is pure speculation.

Contrary to Respondents' assertions, Petitioners' counsel has not endorsed this contention or conceded that it was true. Respondents insist that, during the administrative appeal hearings, Petitioners' counsel asserted that water could overtop the berm or flow through cuts in the berm and enter the Sutherland-Oemig Drain, but this is a misleading characterization of statements by Petitioners' counsel, which takes them entirely out of context. (Brief in Opposition at 9-10). In the portion of the

[1] In the state adminsitrative proceedings, which occurred before Petitioners' permit application to the Corps, the Michigan Department of Environmental Quality also found that there was no hydrological connection between the wetland and Lake St. Clair or any other body of water. (Court of Appeals Joint Appendix at 697).

administrative appeal hearing cited by Respondents, the parties were discussing Petitioners' proposal of a water retention pond as part of their development plan for the Property. Reciting the various advantages of the plan, Petitioners' counsel noted that the proposed water retention pond would actually have a greater capacity for holding water run-off than the existing wetland. (Court of Appeals Joint Appendix at 639). Petitioners' counsel never asserted that water had ever overtopped the berm or otherwise flowed from the wetland into the Sutherland-Oemig Drain; he asserted that the theoretical water-holding capacity of the proposed retention pond was greater than the theoretical water-holding capacity of the existing wetland. (*Id.*). Consequently, the statement by Petitioners' counsel to which Respondents cite does not constitute a concession of the factual proposition that there is a hydrological connection between the wetland and Lake St. Clair. If there were any concessions on this point at the administrative appeal hearing, they were made by the Corps. On the same page of the administrative record cited by Respondents, an official of the Corps asserted "right now there is no outflow. Essentially it is off-line, if you will." (*Id*). That is, the Corps admitted that the wetland is currently not part of the existing watershed. Thus, not only does this portion of the record fail to support Respondents' assertions about the existence of a hydrological connection, it actually refutes Respondents' assertions and clarifies the fact that, until Respondents' briefing in the court of appeals, the Corps had consistently taken the position that the wetland did not have a hydrological connection to Lake St. Clair or any part of the Lake St. Clair watershed.

Just as Petitioners have not conceded that there is a hydrological connection between the wetland and the Lake St. Clair watershed, the court of appeals did not, as Respondents suggest, find that any such hydrological connection existed. Respondents are correct in pointing out that the court of appeals asserted that there was no "immediate drainage" from the wetland to the adjacent drainage ditch and ultimately to the Sutherland-Oemig Drain. (*See* Petition at 3a). But the court of appeals' assertion that there was no "immediate drainage" does not necessarily lead to the conclusion that there must have been some drainage from the wetland. Respondents' interpretation of the court of appeals' statements cannot be substituted for the statements that the court of appeals actually made, which were anything but a finding that there was a hydrological connection.

By making such strenuous efforts to show the existence of a hydrological connection in this case, Respondents tacitly acknowledge the novelty of the Sixth Circuit's opinion here and its departure from the rulings of other circuit courts, not to mention from the principles established by this Court in *Solid Waste Agency of Northern Cook Cty v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"). As Petitioners have argued, the principles of *SWANCC* as well as the rulings of the other circuit courts establish that there cannot be a "significant nexus" between a wetland and federal waters unless there is, at an absolute minimum, a hydrological connection between the two. With the exception of the court of appeal's opinion here and two opinions by the district court for the Northern District of California, every other federal court that has addressed this issue has concluded that a

wetland is subject to regulation under the CWA only if there is, at the very least, a hydrological connection between that wetland and federal waters. In their Brief in Opposition, Respondents never even attempt to explain how a wetland can properly be subject to regulation under the CWA in the absence of such a connection. Thus, Respondents do not contest Petitioners' most fundamental legal argument: that the court of appeal's opinion here establishes new – and erroneous – precendent regarding the scope of federal authority under the CWA.

The court of appeals' opinion creates confusion and conflict in federal law, and it is contrary to the principles established by this Court for the definition of the scope of federal authority under the CWA. As this Court has held, the fundamental purpose of the CWA is regulate waters and wetlands to the extent necessary to maintain the integrity of federal waters. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-35 (1985). When a wetland has no hydrological connection with any federal waters, its regulation cannot affect the integrity of federal waters in any way, and, therefore, it cannot fall within the scope of the CWA. Consequently, this Court should take jurisdiction of this case and correct the Sixth Circuit's erroneous decision to improperly expand the scope of the CWA.

II

THE CIRCUIT SPLIT CREATED BY THE SIXTH CIRCUIT'S DECISION HERE REQUIRES REVIEW BY THIS COURT BECAUSE IT IMPLICATES OTHER DIFFERENCES AMONG THE CIRCUITS REGARDING THE SCOPE OF FEDERAL AUTHORITY UNDER THE CWA

As noted above, when the court of appeals concluded that Petitioners' wetland could be regulated under the CWA even though it lacked a hydrological connection to federal waters, it created a split with the other courts of appeal that have ruled that a hydrological connection is the absolute minimum requirement for CWA jurisdiction. This circuit split has implicated another division of opinion among the circuit courts, regarding whether the CWA covers wetlands that are adjacent to non-navigable waters. Respondents insist that this Court should disregard this second division of opinion because Petitioners did not raise an argument on this point in the court of appeals and because the court of appeals' decision did not address this issue, but this issue is, in fact, directly relevant to this case and is an additional reason for granting the petition here.

As an initial matter, Petitioners have properly presented the question whether the court of appeals' opinion here contributes to confusion about the scope of federal jurisdiction under the CWA. In their briefs in both the district court and the court of appeals, Petitioners took the position that allowing the Corps to regulate their wetland was contrary to every federal appellate ruling regarding the scope of federal authority under the CWA, including rulings by the

Fourth, Fifth, Sixth and Ninth Circuits. In explaining this position, Petitioners pointed out that all of these courts had required a hydrological connection as the minimum for CWA jurisdiction, but that the Fifth Circuit's understanding of the scope of CWA jurisdiction differed from that of the other courts, and both the district court and the court of appeals noted this point. (Petition at 10a & 44a-45a). Indeed, the district court even understood Petitioners to be advocating for the adoption of the Fifth Circuit's rule. (*See* Petition at 45a).

Moreover, regardless of whether Petitioners specifically discussed the differences between the Fifth and other circuits on this issue, Petitioners certainly preserved the right to discuss all aspects of this issue by raising their general arguments about the scope of federal authority under the CWA. This Court has held that parties are not limited in this Court to reiterating the precise arguments that they raised in the lower courts. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). "A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below. *Id.* at 535. By discussing the general confusion of the law regarding CWA jurisdiction, Petitioners have certainly raised questions that make the Fifth Circuit's rulings relevant to the fundamental question presented here.

III

PETITIONERS HAVE NOT WAIVED ANY ARGUMENTS REGARDING WHETHER THE COURT OF APPEALS' INTERPRETATION OF THE CWA IS CONSISTENT WITH THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

Respondents also argue that Petitioners have failed to adequately preserve their right to argue that the court of appeals' interpretation of the CWA is not consistent with this Court's recent definition of the scope of congressional authority under the Commerce Clause of the United States Constitution. Here again, Respondents' arguments are unavailing because Petitioners specifically raised this issue in the lower courts. (*See* Petitioners' Court of Appeals Brief at 28-30). In any event, Petitioners' arguments about the proper scope of congressional authority regarding the regulation of intrastate wetlands is inextricably intertwined with their arguments about the proper scope of federal authority under the CWA. Both arguments implicate fundamental questions about what Congress was permitted to do or about what it actually did do in enacting the CWA. Consequently, when Petitioners raised an issue about what may be lawfully regulated under the CWA, they raised an issue that implicates both the proper interpretation of the statute itself and the scope of congressional authority to enact such a statute. According, under the principles identified in *Yee*, *supra*, Petitioners have properly raised this issue, and this Court may consider it as an additional reason for granting the petition.